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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 41 ORIGINAL

STATE OF OHIO, EX REL., PAUL W. BROWN, Attorney General of Ohio, State House Annex, Columbus, Ohio 43215, *Plaintiff*,

v.

WYANDOTTE CHEMICALS CORPORATION, a corporation existing under the laws of Michigan, located at 1609 Biddle Avenue, Wyandotte, Michigan,

and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, a corporation existing under the laws of the Dominion of Canada, located at Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, a corporation existing under the laws of Delaware, located at Midland, Michigan, *Defendants*.

BRIEF OF DOW CHEMICAL OF CANADA, LIMITED IN REPLY

SUMMARY OF ARGUMENT

1. The Supreme Court of the United States ought not exercise its discretion in assuming original jurisdiction over a claim for prohibitory injunctive relief over a foreign resident where the basis of the alleged nuisance has already been effectively eliminated and there has been responsible, realistic, effective and suf-

ficient steps taken and being taken by the foreign governmental authorities having direct jurisdiction and control over the alleged tortfeasors such as to ensure that the conduct complained of will not be resumed.

2. The Supreme Court of the United States in its discretion ought not to assume original jurisdiction over an action claiming a mandatory injunction where grave doubt exists on the indisputable merits whether any court in the result would make such an order because:

(a) Such an order is manifestly beyond the practical limitations of the court's facilities both as to administration and supervision.

(b) Scientific and technological uncertainty exists as to existence of a method of removing the mercury.

(c) Scientific and technological uncertainty exists as to the sources of the mercury sought to be removed.

(d) The plaintiff has not taken action against known mercury polluters within its immediate direction and control.

(e) Lake Erie was severely damaged by a multitude of types and sources of pollution long before mercury was discovered in its waters.

(f) This defendant is remote from the alleged contamination and uncertainty exists as to any causal relationship while at the same time mercury polluters of Lake Erie who have been identified and with respect to whom no doubt as to causation exists are not parties to the action.

(g) There exists the 1909 Boundary Waters Treaty which was designed to prevent just this type of multiplicity of legal proceedings and chaos.

(h) The relief claimed would be futile, if ordered, because the mercury pollution of Lake Erie is demonstrably continuing on a daily basis from sources within the State of Ohio itself and other riparian States.

3. A. The State of Ohio seeks compensatory damages only in its capacity as trustee on behalf of its citizens and such claim is constitutionally beyond the original jurisdiction of the Supreme Court of the United States.

B. There is no precedent to support a parens patriae action for compensatory damages nor is there any precedent to support a parens patriae action by one of the States of the United States against a foreign sovereign or a party resident outside of the United States and subject to a foreign sovereign.

4. While in no way conceding the correctness of the arguments raised by the Brief of the United States as to personal jurisdiction or service of process, Dow Chemical of Canada, Limited concedes that these issues may be raised in subsequent proceedings if leave to file complaint is granted to the State of Ohio.

Argument Number 1

THE CLAIM FOR A PROHIBITORY INJUNCTION

THE SUPREME COURT OF THE UNITED STATES OUGHT NOT EXERCISE ITS DISCRETION IN ASSUMING ORIGINAL JURISDICTION OVER A CLAIM FOR PROHIBITORY INJUNCTIVE RELIEF AGAINST A FOREIGN RESIDENT WHERE THE BASIS OF THE ALLEGED NUISANCE HAS ALREADY BEEN EFFECTIVELY ELIMINATED AND THERE HAS BEEN RESPONSIBLE, REALISTIC, EFFECTIVE AND SUFFICIENT STEPS TAKEN AND BEING TAKEN BY THE FOREIGN GOVERNMENTAL AUTHORITIES HAVING DIRECT JURISDICTION AND CONTROL OVER THE ALLEGED TORTFEASOR SUCH AS TO ENSURE THAT THE CONDUCT COMPLAINED OF WILL NOT BE RESUMED.

1. The Order issued by the Ontario Water Resources Commission on March 26th, 1970 [1] remains in force and will so remain indefinitely. Dow Chemical of Canada, Limited is continuing to comply fully with that Order, to the complete satisfaction and under the regular supervision of the Ontario Water Resources Commission. The measures taken by Dow Chemical of Canada, Limited to prevent any possible escape of metallic mercury from its plant are complete, comprehensive and permanent in nature.[2]

2. Where, as here, there has been "an overt and visible reversal of policy, carried out by extensive operations which have every appearance of being permanent," an injunction should be denied.[3]

3. The Ontario Water Resources Commission Amendment Act, 1970, was proclaimed in the Province of Ontario on November 13th, 1970. Under this statute,

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[1] Appendix VI of the Brief in Opposition filed by Dow Chemical of Canada, Limited.

[2] See p. 7, para. 6, Brief in Opposition Dow Chemical of Canada Limited.

[3] *U.S.* v. *Oregon State Medical Soc.*, 343 U.S. 326 (1952); *U.S.* v. *Uniroyal, Inc.*, 300 F. Supp. 84, 96 (S.D.N.Y. 1969).

fines may be imposed upon any person causing material to enter rivers, lakes or other waters which may impair the quality of the water.[4]

4. By Section 8 of that Act it was declared that:

> "the quality of water shall be deemed to be impaired if, notwithstanding that the quality of the water is not or may not become impaired, the material deposited or discharged or caused or permitted to be deposited or discharged or any derivative of such material causes or may cause injury to any person, animal, bird or other living thing as a result of the use or consumption of any plant, fish or other living matter or thing in the water or in the soil in contact with the water."

5. By Section 10 of the same statute there is provision, on first conviction of an offender, for a fine of not more than $5,000.00; and, on each subsequent conviction, for a fine of not more than $10,000.00. Each day that an offender contravenes the statute is deemed to be a separate offense.

6. There are technological limitations to the present ability of mankind to totally prevent the escape of mercury into the environment. That such technological limitations exist at the present time has been recognized by the Ontario Water Resources Commission in their official recognition that the effluent of chlor-alkali plants will have a residual mercury content of "less than one pound per day".

7. The technological limitation is also recognized by the U.S. Government's acceptance pro tempore of a minimum acceptable daily standard of a continuing residual escape of mercury into the enviroment in the

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[4] See Appendix I.

two cases under the Refuse Act which have been settled on this point by stipulation.[5]

8. This limitation is recognized in the draft effluent regulations for the chlor-alkali industry regarding mercury under the Fisheries Act, prepared by the Environmental Quality Directorate, Department of Fisheries and Forestry, Government of Canada, dated December 15, 1970.[6]

9. In the release made by the Hon. Mr. J. Davis, Federal Minister of Fisheries, Government of Canada, of December 15, 1970, it is clear that the Government of Canada is proceeding towards the total elimination of mercury in the shortest possible time. It is stated in part:

> "Swedish experts suggest that .01 pounds of mercury in liquid effluent per ton of chlorine produced is the best feasible with current technology. The successes of most chlor-alkali plants in Canada suggest that our technology has advanced beyond that of the Swedes. Canadian experience suggests effluent losses less than half those as cited by the Swedes, as being attainable.
>
> *Regulation*
>
> Our interim regulation will require that by April 1, 1971, all chlor-alkali plants in Canada reduce their liquid effluent losses of mercury to 0.01 pounds per ton of chlorine produced with a further reduction to .005 pounds mercury per ton of chlorine by June 1, 1971. The regulation will come up again for review in January, 1972, at which

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[5] *United States* v. *Allied Chemical Corporation*, Civil Action No. 70-CU-256 N.D.N.Y. Sept. 15, 1970; and *United States* v. *Olin Corporation*, Civil Action No. 1970-338 W.D.N.Y. Sept. 21, 1970.

[6] See Appendix II.

time the next stage in reduction toward the goal as zero should be stipulated." [7]

10. Applying this standard to Dow Chemical of Canada, Limited, whose plant has a capacity of 410 tons of clorine per day, the maximum permissible loss under these regulations would be 4.1 pounds per day.

11. On March 23, 1970, an emergency arose when the Canadian Government, on that date, imposed a ban on fishing because of the discovery of mercury in fish. Within 4 days of the onset of this emergency, the content of the effluent from the plant of Dow Chemical of Canada, Limited, complied not only with the requirements of the Canadian Federal Department of Fisheries now about to come into force but thereafter so complied; and since that date it has always been acceptable to the Ontario Water Resources Commission.

12. No basis now exists for anticipating that at any time in the future mercury may escape from the plant of Dow Chemical of Canada, Limited as may impair the quality of the water of either the St. Clair River or Lake Erie. In the result, the basis of the issue of the injunctive relief sought by the State of Ohio has become academic.

13. There is no suggestion seriously and responsibly advanced that the steps already taken by the Ontario Water Resources Commission and the Canadian Federal Department of Fisheries and Forestry and the Government of the United States in the Refuse Act Cases are irresponsible, unrealistic, ineffective or insufficient. Nor is there any real suggestion that there is any order that this Court might reasonably make that would be more responsible, more realistic, more effective, or more sufficient than those steps already taken and being taken.

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[7] Ibid.

Argument Number 2

THE CLAIM FOR A MANDATORY INJUNCTION

THE SUPREME COURT OF THE UNITED STATES IN ITS DISCRETION OUGHT NOT TO ASSUME ORIGINAL JURISDICTION OVER AN ACTION CLAIMING A MANDATORY INJUNCTION WHERE GRAVE DOUBT EXISTS ON THE INDISPUTABLE MERITS WHETHER ANY COURT IN THE RESULT WOULD MAKE SUCH AN ORDER BECAUSE:

(A) Such an order is manifestly beyond the practical limitations of the Court's facilities both as to administration and supervision.

(B) Scientific and technological uncertainty exists as to existence of a method of removing the mercury.

(C) Scientific and technological uncertainty exists as to the sources of the mercury sought to be removed.

(D) The Plaintiff has not taken action against known mercury polluters within its immediate direction and control.

(E) Lake Erie was severely damaged by a multitude of types and sources of pollution long before mercury was discovered in its waters.

(F) This Defendant is remote from the alleged contamination and uncertainty exists as to any causal relationship while at the same time mercury polluters of Lake Erie who have been identified and with respect to whom no doubt as to causation exists are not parties to the action.

(G) There exists the 1909 Boundary Waters Treaty which was designed to prevent just this type of multiplicity of legal proceedings and chaos.

(H) The relief claimed would be futile, if ordered, because the mercury pollution of Lake Erie is demonstrably continuing on a daily basis from sources within the State of Ohio itself and other riparian states.

1. This Court is asked to direct the removal of mercury and mercury compounds from Lake Erie, (or require the defendants to pay damages in lieu to be held in a trust fund for that purpose) and supervise

the implementation and progress of removal. Such an order would impose on the Court a tremendous administrative burden entirely beyond its limited facilities.[8] It would also lead the Court into a wilderness of new technology and scientific uncertainty. The technical and scientific experts themselves are in disagreement as to the best and most efficient means of removing mercury from lakes and rivers or neutralizing the effects of methylation. The Hon. Mr. Brunelle, Minister of Lands and Forests of the Province of Ontario has reported that some experts believe that dredging may help; while at the same time he acknowledges that others just as knowledgeable believe it will do more harm than good.[9]

2. The same difference of opinion exists in the United States. The Deputy Director of the Michigan Department of Natural Resources and Executive Secretary of the Michigan Water Resources Commission testified, as follows, before the Subcommittee on Energy, Natural Resources and the Environment of the U.S. Senate Committee at hearings held in Michigan on May 8, 1970:

> "We are evaluating the feasibility of removing contaminated sediments through dredging. It has been estimated that to dredge a strip 150 feet wide, 3 feet deep and 1 mile long of the Detroit River would cost approximately one-half million dollars. The cost of dredging Lake Erie, due to the large area involved, would be enormously expensive. *Dredging, moreover, could conceivably cause significant environmental (sic) damage including pos-*

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[8] See para. 8, p. 45 Brief in Opposition Dow Chemical of Canada, Limited.

[9] Legislature of Ontario Debates, Oct. 8, 1970, the Hon. Mr. Brunelle, Minister of Lands and Forests, p. 4781—Appendix III.

sible additional releases of mercury compounds to the aquatic environment. No conclusion has been reached as yet on the possibility of any dredging. Efforts are also underway to determine whether there is any possible way to chemically neutralize or bind the mercury in bottom sediments within the affected area. Results to date do not indicate any practical method of chemical treatment of the contaminated bottom sediments." (p. 11, testimony of Ralph Purdy.) (emphasis added)

3. Previously, in 1968, the Federal Water Pollution Control Administration in considering pollution of Lake Erie from sources other than mercury had reported:

> "*Dredging Lake Erie.* A possible step to the immediate improvement of Lake Erie, in addition to the previous recommendations, is the dredging of the lake bottom. This would be the ultimate in refinement of water quality in the lake.
>
> "*The cost to dredge the top three feet of sediments would be many billions of dollars and would take many decades to accomplish.* Because of the complete absence of knowledge about actual benefits of such an undertaking and the great expense, this is considered impractical. The FWPCA does not believe that it will be necessary to remove bottom sediments in order to restore Lake Erie water quality. Even if such a project were undertaken, the disposition of the dredged material would be a major problem." (emphasis in original) [10]

4. Scientific studies now in progress are expected to point the way to realistic and effective solutions in the near future. In Sweden, where problems of absorption of mercury by fish in fresh water lakes were first rec-

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[10] U.S. Department of Interior, FWPCA, Lake Erie Report: A Plan for Water Pollution Control (Aug. 1968), at 82.

ognized, experiments are being conducted to test several new methods of rendering methylated mercury harmless or inactive.

5. In recent months, scientists have unanimously concluded that the mercury which is present in the environment comes from many sources, both natural and industrial. Mercury has now been discovered in the waters of lakes which are remote and which are isolated from any possible source of industrial contamination.[11] It has also been discovered recently that mercury, in significant amount, was present in fish which were caught about 40 years ago in remote areas of the Adirondaks. The water in these areas were free, at that time, from agricultural and industrial sources of mercury.[11a]

6. At the International Conference on Environmental Mercury Contamination held at the University of Michigan from September 30th to October 2, 1970, it it was disclosed that fossilized fuels emit mercury when burned.

7. Many sources of mercury pollution are located in the City of Detroit which is situated more than 60 miles downstream from the plant in Sarnia of Dow Chemical of Canada, Limited. At the same Conference, a paper was read by Mr. Williams Turney as a representative of the Michigan Water Resources Commission. In particular, Mr. Turney informed the Conference that the plants of Detroit-Edison and Consumers Power, which are adjacent to the Detroit River, constantly

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[11] Legislature of Ontario Debates, Oct 8, 1970, the Hon. Mr. Brunelle, Minister of Lands & Forests, p. 4781—Appendix III.

[11a] "Mercury: Omnipresent Poison" Washington Post, December 28, 1970. App. IV.

emit large quantities of mercury. Calculations made by him showed that the amount of coal burned within the State of Michigan, for the purpose of generating electricity, should produce about 20,000 lbs. of mercury annually.[12]

8. In October 1970, Counsel for Dow Chemical of Canada, Limited requested the office in Ohio of the Federal Water Pollution Control Administration of the Department of the Interior of the United States to provide a list of all sources from which mercury is believed to enter the waters of Lake Erie. The reply to this request was a letter dated November 30th, 1970 to which was annexed a list of Companies known to discharge or to have discharged mercury to Lake Erie or its tributaries. Dow Chemical of Canada, Limited did not appear on this list. (This letter and list are reproduced in Appendix V hereto).[13] One of the sources appearing on this list is an agency of the Government of the United States.

9. Lake Erie was severely damaged by a multitude of types and sources of pollution long before mercury was discovered in its waters. In the issue of *Holiday* magazine for May, 1968, Mr. Justice Douglas wrote:

> "Lake Erie, the recreational frontyard of Buffalo, Cleveland, Toledo and Detroit is gone. Though it supplies water for ten million people, even the heart of it has none of the dissolved oxygen necessary for the fish, plants and insects on which lakes thrive. Erie now supports little aquatic life except trash fish, bloodworms, sludgeworms and bloodsuckers. A monstrous cancerlike growth of

[12] "Coal Burning Generators, Mercury Pollution Linked", Detroit Free Press, October 1, 1970.

[13] See Appendix V.

algae, nourished by phosphates from industrial wastes, possesses this body of water.

Lake Erie is shallow, and some think that at the present rate it will be completely polluted with sludge, algae and other deposits within twenty-five years." [14]

In August 1968, *Life* magazine reported:

"At the present rate of weed growth, Lake Erie will become a Sargasso Sea within the lives of our children; already a foot-deep mat of algae covers several hundred miles of Erie." [15]

10. On August 23, 1968, *Life* magazine reported, as a caption to a picture:

"Erie's curse is the Cuyahoga, which snakes through Cleveland . . . carrying a load of detergents, sewage and chemicals to the lake. Eyesores abound at river's edge . . . and in the Cleveland port itself, where left-over litter is used to build unsightly breakwaters . . . The big port has only one commercial fisherman . . . and Fred Wittal, shown at far right cleaning a meager perch catch, is leaving too."

11. If mercury were the only potential source of harm to the economy or citizens of Ohio, the fact is that the plant of Dow Chemical of Canada, Limited is at Sarnia where Lake Huron empties into the St. Clair River. Sarnia is more than 60 miles from Lake Erie. It is upstream from the Detroit River, which flows into Lake Erie. It is upstream from Lake St.

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[14] Douglas, "Their Glory Is In Danger", *Holiday* (May 1968), p. 65.

[15] Woodbury, "Sewage Gushes On, But Something Is Being Done", *Life*, (Aug. 23, 1968), p. 46.

Clair which empties into the Detroit River. It is at the head of the St. Clair River which flows into Lake St. Clair.

12. It is submitted that there is no evidence at all to show that mercury from the plant of Dow Chemical of Canada, Limited ever reached beyond the St. Clair River or, at most, the northern portions of Lake St. Clair. Certainly there is no evidence that mercury from the Sarnia plant ever reached Lake Erie. Indeed the evidence is to the contrary. Sampling of the bottom sediments conducted by Dow Chemical of Canada, Limited indicates that mercury from the Sarnia plant may not have reached even as far as Lake St. Clair, which is downstream of the Sarnia plant.

13. R. W. Purdy, Deputy Director of the Michigan Department of Natural Resources, testified before the Senate Subcommittee on Energy, Natural Resources and the Environment as follows:

> "The Federal Water Pollution Control Administration has completed extensive tests of bottom sediment samples from Lake St. Clair, the Detroit River, and Lake Erie. Their results show no significant amounts of mercury in the sediments of the Michigan portion of Lake St. Clair."

14. To the extent that there is mercury in the Detroit River or Lake Erie, there is no reason why it should be assumed to come from the plant of Dow Chemical of Canada, Limited which is located in Ontario on the St. Clair River and near Lake Huron, rather than from recognized sources of mercury located along the Detroit River and Lake Erie. Indeed,

as reported by the Federal Water Quality Administration in May 1970:

> "The Detroit River area is the primary source of mercury in the *western* end of Lake Erie. This is revealed by the distribution pattern established through sediment samples . . ." (emphasis added) [16]

15. Even more important perhaps are those other sources of mercury pollution of Lake Erie actually located within the plaintiff State of Ohio to which the State of Ohio chooses to make no reference in its complaint. Injunctive relief is equitable relief and he who would seek equity must do equity. The person seeking equity must come with clean hands. The State of Ohio, in failing to take action against those mercury polluters within its direct control, is in breach of this fundamental equitable doctrine.

16. Under all these circumstances, it would be patently unjust to require merely one potential and relatively remote and unproven source of pollution of Lake Erie to assume financial responsibility for removing all the mercury from the whole lake and its tributaries. Whatever action is taken to this end should involve and be binding upon all of the agencies, corporations, persons and communities responsible for contributing to the problem and all of the states and provinces abutting on the lake.[17]

17. If the State of Ohio is permitted to bring this suit, there is no reason why all the other states and

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[16] Federal Water Quality Administration, "Investigation of Mercury in the St. Clair River—Lake Erie Systems", May 1970.

[17] See para. 5, pp. 40-41 Brief in Oppostion Dow Chemical of Canada, Limited.

all the Canadian provinces on the Great Lakes system should not have a similar right. If the State of Ohio can sue a Canadian citizen in the Supreme Court of the United States for alleged pollution of Lake Erie, the States of Michigan, Pennsylvania, and New York would have the same right to sue Canadians; and the Governments of Canada and of the Province of Ontario would likewise be entitled to sue agencies, corporations, persons and communities resident in the United States of America.

18. Such a multiplicity of suits would create chaos and bring about the very type of situation the 1909 Boundary Water Treaty was designed to prevent.[18]

19. But even apart from the Treaty, principles of comity would suggest that the State of Ohio not be permitted to sue a Canadian citizen which has done everything required by both Canadian Federal and Provincial authorities and is making every effort to co-operate and to comply with its own governmental agencies.

Similarly, comity would not be advanced if either or both the Government of Canada or of the Province of Ontario could sue citizens of the State of Ohio or communities within the State of Ohio or the Governmental agencies which are the most serious contributors to the pollution of Lake Erie and all of whom are subject to the jurisdiction of the State of Ohio.

20. Mercury is only one of the many and complex problems affecting the waters of Lake Erie and the fish therein. It is submitted that, having regard to all the foregoing facts a gross injustice would be per-

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[18] See pp. 39-44 Brief in Opposition of Dow Chemical of Canada, Limited, esp. para. 4 at p. 42.

petrated if Dow Chemical of Canada, Limited were required to bear the financial burden of attempting to remove all mercury in Lake Erie—and especially when scientists are not in agreement as to the means of removing or neutralizing the mercury.

21. For this Court to make an Order requiring Dow Chemical of Canada, Limited to remove all mercury from Lake Erie would be tantamount to imposing the Herculean labour of cleansing the Augean stables.

22. Any attempt by Dow Chemical of Canada, Limited to remove mercury from Lake Erie would be defeated and rendered futile, and would necessarily extend into perpetuity while substantial quantities of mercury continue to escape into the waters of Lake Erie from many sources, including those already named.[19]

23. The magnitude and complexity of the contributing causes and their effects suggest that a truly effective solution must lie in the area of co-operative administrative action by all the governmental entities affected and not through piecemeal judicial action against only a few alleged offenders or benefiting only one of the states or governments involved.[20]

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[19] Sir James Frazer in his commentary on Pausanias (v.10.9) quotes a Norse tale, "The Mastermaid" in which a prince who wishes to win a giant's daughter must first clean three stables. For each pitch-fork of dung which he tosses out, ten return. It is only upon the princess' advice to turn the pitch-fork upside down that his labour is attendant with any success. Frazer suggests that in the original version Hercules may have received the same advice from Athene: Robert Graves suggests that it is more likely that this Norse tale is a variant of this Fifth Labour of Hercules. Robert Graves Greek Myths, Vol. II, Penguin Edition, p. 118.

[20] See also para. 5, p. 41 Brief in Opposition Dow Chemical of Canada, Limited.

24. The task of unravelling the facts and determining a course of remedial action with respect to one of the most complex ecological problems facing the United States and Canada today is a formidable one. Where alternative methods of resolving the problems exist, which alternative methods, it is submitted, provide greater flexibility and facility of supervision than that attainable through court procedure, it is submitted that it then becomes undesirable for this court to assume original jurisdiction.[21]

25. In an original suit, unlike a case on appellate review, "even when the case is first referred to a master, [the] . . . Court has the duty of making an independent examination of the evidence, a time-consuming process . . ."[22] Such cases "consume a disproportionate amount of the Court's time."[23]

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[21] For legal authorities please refer to those already cited p. 40 and p. 45 Brief in Opposition of Dow Chemical of Canada Limited: *Dyer* v. *Simms*, 341 U.S. 22, Justice Holmes at 27 (1951).

[22] *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 470 (1945).

[23] 11 Stan. 1 Rev. 665, 695 (1959).

Argument Number 3

THE CLAIM FOR COMPENSATORY DAMAGES

A. The Constitutional Issue as to Jurisdiction

THE STATE OF OHIO SEEKS COMPENSATORY DAMAGES ONLY IN ITS CAPACITY AS TRUSTEE ON BEHALF OF ITS CITIZENS AND SUCH CLAIM IS CONSTITUTIONALLY BEYOND THE ORIGINAL JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

1. The claim for compensatory damages must be distinguished from the claim for damages in lieu of a mandatory injunction. They are separate and distinct types of relief. A right to one may exist in the absence of any right to the other.

2. The Solicitor-General seeks to explain the claim for compensatory damages as a "reclamation trust fund" claim. This is to characterize it as damages in lieu of the mandatory injunction.[24] That this is a misapprehension on the part of the Solicitor-General is clear from the prayer from the complaint of the State of Ohio itself:

> "WHEREFORE, Plaintiff prays:
>
> 1. That *a decree* be entered adjudging that the conduct of Defendants in introducing poisonous mercury or compounds thereof into Lake Erie or tributaries thereto *constitutes a public nuisance and that such nuisance be abated.*
>
> 2. That *a decree* be entered perpetually *enjoining the* Defendants and each of them *from introducing poisonous mercury* or compounds thereof into Lake Erie or any tributary thereto.
>
> 3. That *a decree* be entered requiring the Defendants and each of them *to remove* from Lake Erie and tributaries thereto the poisonous mercury and

[24] Pp. 11 and 12, Brief of United States as Amicus Curiae.

compounds thereof or, *in the alternative,* requiring Defendants to pay to Plaintiff as *damages* an amount not yet determined but to be determined in this cause *sufficient to enable Plaintiff to remove said mercury and compounds thereof from Lake Erie* and any tributaries thereto, said sum to be held in trust for and expended only for this purpose by Plaintiff; such decree to contain appropriate provisions for reporting to the Court on progress of removal so that appropriate enforcement of said decree can be implemented.

4. That *a decree* be entered adjudging that the Plaintiff recover from the Defendants *damages* in an amount not yet determined but to be determined in that cause *compensating for the existing and future damages to Lake Erie,* the fish and other wildlife, the vegetation and the citizens and inhabitants of Ohio." (emphasis added)

3. While there exists some precedent to support a parens patriae claim for injunctive relief, there exists no precedent for a parens patriae action for pure compensatory damages. The attempt to characterize the claim as a "reclamation trust fund" misconceives the true character of the claim asserted by the State of Ohio. It is simply an attempt to provide a foundation for such a claim parens patriae.

4. Inasmuch as there already is a claim parens patriae for a mandatory injunction and a further claim for damages in lieu thereof, this characterization as suggested by the Solicitor-General implies a redundancy in the claim of the State of Ohio.

5. If one were to presume against such redundancy, one is left with a pure damages claim. Such a claim is not an alternative to the damages in lieu of a mandatory injunction but in addition thereto.

6. Insofar as the proposed action of the State of Ohio is a common law nuisance action merely for damages alone, Dow Chemical of Canada, Limited does *not* dispute the right of the State of Ohio to commence, in the *proper forum*, an action for compensatory damages on behalf of its citizens for injuries allegedly done to their beneficially held property or interference with their rights of user.

7. Dow Chemical of Canada, Limited *does* dispute however that this Court has *original jurisdiction* to entertain such an action because in such an action for compensatory damages the State of Ohio would not be a party plaintiff in its own behalf, as is required by Article 3, Section 2 of the Constitution as construed by this Court.[25] Instead it would be bringing the action for the benefit of other persons.

8. The issue is, therefore, one concerning the nature of the rights which the State of Ohio may properly assert in the proposed action.

9. It is submitted that the State of Ohio does not beneficially possess any property or usufructuary rights in the subject matter alleged to have been injured by Dow Chemical of Canada, Limited.

10. The only proprietary rights of anyone alleged to have been adversely affected so as to give rise to an action at common law for nuisance are proprietary rights to the waters, soil and contents of Lake Erie.[26]

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[25] For legal authorities please refer to those already cited pp. 30, 31 and 32 Brief in Opposition of Dow Chemical of Canada, Limited.

[26] Presumably "contents" is exclusive of "water" as used in the wording of the section, and therefore must be construed as vesting rights to the fish insofar as the same are capable of being owned by anyone.

11. In this instance the State of Ohio, by declaration in its revised Code 123-03 has declared that it holds the waters, soil and contents of Lake Erie as "proprietor in trust".

12. A legal entity may hold property either as a trustee or as a beneficial owner. No other form of vesting of property is known to the law.

13. A "proprietor in trust", it is submitted, is one in whom property is vested as a trustee rather than as beneficial owner.

14. Because Revised Code 123-03 is legislation of the State of Ohio itself, it is submitted that it is not open to the State of Ohio to adopt in this action a position inconsistent with its own declaration. It is precluded from doing so by the principles embodied in the doctrines of estoppel and election.

15. Distinction must be made between rights of user and rights as a proprietor.

16. The public trust doctrine envisages the State as holding in trust for its citizens certain rights to the use of natural resources the legal title to which is vested in the State.[27]

17. The doctrine is, therefore, similar to the effect sought to be achieved by the State of Ohio's statutory declaration *supra,* but the public trust doctrine is expressed in terms of rights of user as distinct from beneficial rights to the property of which use is to be made. Thus the word "proprietor" is defined by

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[27] Sax, *The Public Trust Doctrine in National Resource Law*, 68 Mich. L. Rev. 471 (1970), esp. at pages 478-491.

the Shorter Oxford English Dictionary (3rd Edition) in terms of ownership:

> "One who holds something as property, one who has the exclusive right or title to the use or disposal of a thing—an owner".

18. The rights of user of the waters of Lake Erie for fishing, drinking, navigation and swimming are inalienable rights of the citizens of the State and of the State itself. If any interference be created to the exercise of these rights, then a damages claim, as distinct from injunctive relief, could not be asserted by the State of Ohio in an action within the original jurisdiction of this Court, because this would violate the constitutional limitation. This is so inasmuch as the measure of damages is the injury to the citizen and the action is on behalf of the citizen and not on behalf of the state.[28]

B. Claims for Damages in Parens Patriae Actions

THERE IS NO PRECEDENT TO SUPPORT A PARENS PATRIAE ACTION FOR COMPENSATORY DAMAGES NOR IS THERE ANY PRECEDENT TO SUPPORT A PARENS PATRIAE ACTION BY ONE OF THE STATES OF THE UNITED STATES AGAINST A FOREIGN SOVEREIGN OR A PARTY RESIDENT OUTSIDE OF THE UNITED STATES AND SUBJECT TO A FOREIGN SOVEREIGN.

19. A State possesses the right to bring a *parens patriae* action to enjoin another State or the citizen of another State from interfering with the State's own quasi-sovereign right to the integrity and inviolability of its human and other resources and natural environment.[29] It is submitted, however, that there is

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[28] See *supra* footnote 25 at page 21.

[29] *Georgia* v. *Tennessee Copper Company*, 206 U.S. 230.

no authority which would extend to the State, as distinct from the Government of the United States, a right to bring such an action against a citizen of a foreign country or against the foreign country itself.[30]

20. Quite apart from the question of the original jurisdiction of this Court, a parens patriae action is not available to a State to protect either its own rights of property or the property rights of its citizens. This is so whether these rights are held beneficially or whether they are held by the State in trust for its citizens.[31]

21. It is submitted that damages are inappropriate to a parens patriae action. If the measure of damages is to be determined by the damage inflicted upon rights of the citizens of the State, the inevitable result would be a clear probability of exposure of a defendant to payment of double compensation. This result follows from the fact that, regardless of the action taken by the State, the citizens thereof would still retain their independent rights to sue for the damage done to them individually.[32]

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[30] *United States* v. *Curtis-Wright Export Corp.*, 299 U.S. 304, 316 (1936).

[31] Ibid; See also *State of Hawaii* v. *Standard Oil Company of California*, 439 F. 2d 1282, 1285 (9th Cir. 1970):

> "An injury to the general economy of the state is not an injury to the business or property of the state or its people. Unless the concepts of business or property are expanded well beyond traditional usage, the general economy of a region cannot be regarded as property in possession of the residents individually or publicly."

[32] *Hawaii* v. *Standard Oil Company of California*, 1970 Trade Cases Section 73, 340 (September 25, 1970); 431 F. 2d 1282 (9th Cir. 1970).

22. At p. 32 of the Brief in Opposition of Dow Chemical of Canada, Limited, the statement is made, "There is no precedent in this Court for the recovery of monetary damages in a parens patriae suit". The case cited in support of that proposition was *State of Hawaii* v. *Standard Oil Company of California* (1969) 301 F. Supp. 982 (D. Hawaii 1969).

23. In that case, Pence C. J. had conceded that a State had standing to sue for damages in a parens patriae capacity insofar as the acts of the defendant had "a deleterious impact upon the general welfare of economy of the State." [33]

24. But even this aspect of the case was overturned on appeal to the 9th Circuit Court of Appeals as reported in 1970 Trade Cases, Section 73, 340 (September 25, 1970) where the Court stated:

> "The general economy is an abstraction. It has no value in itself, save as it may (in a representational capacity on behalf of business and property generally) serve to confer value on the specific items of business or property it affects. It exists only as a reflection of the business or property values it represents." [34]

25. It is submitted that the Court is incapable of assessing compensatory damages to the "general economy" without making an assessment of the damages suffered by the citizens of the State in their individual capacities. To permit both the State and also its citizens to maintain separate actions arising out of

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[33] Ibid; at page 987.

[34] Subsequently reported in 431 F. 2d 1282 (9th Cir. 1970).

the same tort is to make it inevitable that double recovery be realized against a defendant tortfeasor.[35]

Argument Number 4

PERSONAL JURISDICTION

1. While in no way conceding the correctness of the arguments raised by the Brief of the United States as to personal jurisdiction or service of process, Dow Chemical of Canada, Limited concedes that these issues may be raised in subsequent proceedings if leave to file complaint is granted to the State of Ohio.

CONCLUSION

It is respectfully submitted that the application by the State of Ohio for leave to file a complaint ought to be denied.

All of Which Is
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[35] See also *Philadelphia Housing Authority* v. *American Radiator and Standard Sanitary Corporation*, 309 F. Supp. 1057 (E.D. Pa. 1969).